

PETITION NOT PRINTED

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**CHARLES ELMORE CROPLEY
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**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1948.

**L. A. NICHOLSON, Administrator of the
Estates of Gus Boswell, Jr., Frances
Boswell, and Gus Boswell III,
Petitioner,**

vs.

**GUY A. THOMPSON, Trustee in Bank-
ruptcy for the Missouri Pacific Rail-
road Company, Debtor,
Respondent.**

**No. 576
Miscellaneous.**

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR CERTIORARI.**

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**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR CERTIORARI.**

To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:

Throughout the following Brief, for the sake of clarity,
brevity and convenience, the parties will be referred to ac-
cording to their standing in the Trial Court: that is, L. A.
Nicholson, Administrator of the Estates of Gus Boswell,
Jr., Frances Boswell and Gus Boswell III, as "plaintiff,"
and Guy A. Thompson, Trustee in Bankruptcy for the Mis-
souri Pacific Railroad Company, Debtor, as "defendant."

The petition for certiorari raises only two narrow ques-
tions, which are the only two questions which have been
involved in this case from the beginning. One is a ques-
tion of fact, as to whether defendant's negligence, if any,
was the proximate cause of injuries to plaintiff's dece-
dents, and whether plaintiff's decedents were guilty of

contributory negligence which was equal to or greater than defendant's negligence, if any. The second is a question of interpretation of the common law as it is applied in the State of Arkansas, and of the interpretation of certain Arkansas statutes. The first has been answered conclusively by the jury by its verdict in favor of defendant, and this verdict has been approved by the District Court for the Western District of Tennessee, Western Division, and by the Court of Appeals for the Sixth Circuit. The second has been answered equally conclusively by the charge given the jury by the District Court for the Western District of Tennessee, Western Division, which was also approved by the Court of Appeals for the Sixth Circuit. There is, therefore, no question of general interest involved in this case which requires this Court to review the action of the Court of Appeals for the Sixth Circuit in affirming the judgment of the District Court for the Western District of Tennessee, Western Division, and, therefore, the writ of certiorari should be denied.

OPINION OF THE LOWER COURT.

The opinion of the Court of Appeals for the Sixth Circuit is quoted in full below:

“This appeal having been heard upon full oral arguments by attorneys for the respective parties, and having been duly considered thereon and upon the record and briefs;

“And it appearing that there is substantial evidence to support the verdict of the jury upon which judgment for the defendant was entered, and that no reversible error was committed in the trial of the case;

“The judgment of the district court is affirmed.”

JURISDICTION.

Statement of petitioner as to the basis of jurisdiction is not challenged.

STATEMENT OF THE CASE.

Respondent accepts petitioner's statement of the case (Petition for Certiorari and Brief, pp. 5 through 8, inclusive), with the following exceptions and additions:

(a) The statement in petitioner's brief that "the fact witnesses in the driver's case and the instant case were the same" has no bearing upon this petition, as each case must be decided by the jury and passed upon by this Court upon the facts appearing in its own record alone and without reference to outside facts not included in the record in the case under consideration.

(b) Respondent does not controvert petitioner's statement that the "surviving witnesses, passengers in said truck, testified that they were unaware of the presence of the track or train until the truck was on the track, that there was a blast of the whistle and the impact," but adds to that statement that the members of the train crew testified that the whistle was blown sometime before the accident and at a distance of eighty rods from the crossing (R. pp. 147, 155, 164, 174, 183), and other witnesses also testified to the same effect (R. pp. 194-195, 201, 205, 218). The jury having found for the defendant, it must be taken as a fact that the whistle on the train was blown at the point required under the Arkansas statute.

(c) Respondent does not controvert petitioner's statement that "surviving witnesses in the truck testified that no bell was rung and no whistle blown until they were on the track," but the record as cited above and also the jury's verdict establish as a fact that the whistle was blown prior to the accident at the point required under the Arkansas statute.

(d) Respondent does not controvert petitioner's statement that "two surviving witnesses who were in the front

seat testified that they saw a dim, yellowish light like that of a one-eyed car as they approached the curve," but states that numerous witnesses also testified that prior to and at the time of the accident the headlight on the engine was burning brightly and in a normal manner (R. pp. 135, 139-140, 147-148, 156-157, 163, 175, 182), and in view of the jury verdict for the defendant in these cases it must be taken as a fact on this petition that prior to and at the time of the accident the headlight on the engine was burning brightly and in a normal manner.

(e) Respondent does not controvert petitioner's statement that "The evidence as to the giving of the crossing signals was in controversy, the train crew and others testifying that proper signals were given, that a proper headlight was burning and that a lookout was kept," but states that in view of the verdict of the jury in favor of the defendant the controversy has now been resolved, and on this petition it must be taken as a fact based upon the record citations given above that the crossing signals were properly given and a proper headlight was burning and that a lookout was kept. As to the latter point, there is abundant uncontradicted evidence that a proper lookout was kept (R. pp. 173-174, 183), and the jury so found.

(f) There was in full force and effect in the State of Arkansas at the time of the accident a certain statute of that State, carried in Pope's Digest of the Statutes of Arkansas, 1937, as Section 6752, which provides as follows:

"Obstruction to driver's view or driving mechanism.

(a) No person shall drive a vehicle when it is so loaded, or when there are in the front seat such number of persons exceeding three, as to obstruct the view of the driver to the front or sides of the vehicle so as to interfere with the driver's control over the driving mechanism of the vehicle."

The uncontradicted evidence shows that at the time of the accident there were more than three persons in the front seat of the vehicle involved (R. p. 21), and the jury by its verdict in favor of defendant has found that this was a violation of that statute and was one of the proximate causes of the accident.

As to the remaining matters contained in petitioner's statement of the case, respondent does not controvert them other than to point out that certain matters contained therein which take the form of argument have no place in such a statement.

ARGUMENT.

Whether Plaintiff's Decedents Were Guilty of Contributory Negligence in a Sufficient Degree to Bar Any Recovery is a Question of Fact for the Jury.

Under the laws of the State of Arkansas, a guest in an automobile can be guilty of negligence proximate contributing to an accident.

Carter v. Brown, 136 Ark. 23, 206 S. W. 71 (1918);
Graves v. Jewel Tea Co., 180 Ark. 980, 23 S. W. (2d) 972 (1930);
Ragland v. Snotzmeier, 186 Ark. 778, 55 S. W. (2d) 923 (1933);
Dermott Grocery & Commission Co. v. Kennedy, 191 Ark. 211, 85 S. W. (2d) 705 (1935);
Sparks v. Chitwood Motor Co., 192 Ark. 743, 94 S. W. (2d) 359 (1936);
Arkansas Valley Co-Op. Rural Electric Co. v. Elkins, 200 Ark. 883, 141 S. W. (2d) 538 (1940).

There is evidence in the record from which the jury could have found, and did find, that plaintiff's decedents were negligent in the following respects:

(a) By riding in an automobile in which there were more than three persons in the front seat in violation of Section 6752 of Pope's Digest of the Statutes of Arkansas 1937 (R. p. 21).

(b) By riding in an automobile, the driver of which had been drinking (R. pp. 12, 65-67).

(c) By riding in the back of a truck covered by a tarpaulin in a position where they could not warn the driver of the truck of approaching danger (R. p. 19).

(d) By failing to warn the driver of the automobile of the fact that there was a railroad track to his right and that the road upon which he was driving made a right turn and crossed it, and failing to call his attention to highway signs indicating this turn and crossing which were located to the right of the road (R. pp. 23-25, 66-67, 71-72).

Whether the negligence of plaintiff's decedents was equal to or greater than that of defendant, if any, under the so-called Arkansas Comparative Negligence Statute (Section 11153, Pope's Digest of the Statutes of Arkansas, 1937), is a question of fact for the jury.

Chicago, Rock Island & Pacific Rd. Co. v. French,
181 Ark. 777, 27 S. W. (2d) 1021 (1930);

Missouri Pacific R. Co. v. Henderson, 194 Ark. 884,
110 S. W. (2d) 516 (1937);

Boswell v. Thompson, 166 Fed. (2d) 106 (Sixth Circuit, 1948).

By its general verdict in favor of defendant, the jury has found that plaintiff's decedents were guilty of negligence which was equal to or greater than that of defendant, if any, and as there is substantial evidence to support this finding, it is conclusive.

**Whether the Injuries to and Death of Plaintiff's Decedents
Were Due Solely to the Negligence of the Driver of
the Truck Is a Question of Fact for the Jury.**

The Trial Court charged the jury that it should find for plaintiff only if it found that defendant was guilty of negligence and that that negligence was the proximate cause of the injuries (R. pp. 240, 242-243).

No exception was taken to this portion of the charge nor was any special request for further instructions upon this

point tendered, and so it must be taken as a correct statement, as it is.

At the time when the automobile drove onto the track it was from one hundred to one hundred and fifty feet in front of the train (R. p. 187). The train was travelling at a speed of forty-five miles per hour (R. p. 183). A period of three seconds was required after the brakes were applied before they would take effect (R. p. 191). During this period the train would travel one hundred and ninety-eight feet or at least forty-eight feet past the point of impact. At the time when the automobile drove onto the track it was already too late for the engineer to prevent the accident by applying the brake.

The so-called Arkansas Lookout Statute (Section 11144, Pope's Digest of the Statutes of Arkansas, 1937) provides that a railroad is liable under it only where "the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril."

Whether or not the injury could have been prevented after discovery under the above statute is a question for the jury.

St. Louis-San Francisco Ry. Co. v. Champion, 108 Ark. 326, 157 S. W. 408 (1913);

Burch v. St. Louis, I. M. & S. Ry. Co., 108 Ark. 396, 158 S. W. 139 (1913);

St. Louis-San Francisco Ry. Co. v. Vernon, 162 Ark. 226, 258 S. W. 126 (1924);

Huff v. Missouri Pac. R. Co., 170 Ark. 665, 280 S. W. 648 (1926);

Chicago, R. I. & P. Ry. Co. v. Jones, 178 Ark. 385, 10 S. W. (2d) 863 (1928);

Baldwin v. Waters, 191 Ark. 377, 86 S. W. (2d) 172 (1935);

- St. Louis-San Francisco Ry. Co. v. Robinson**, 196 Ark. 964, 120 S. W. (2d) 567 (1938);
St. Louis S. W. Ry. Co. v. Braswell, 198 Ark. 143, 127 S. W. (2d) 637 (1939);
Missouri Pac. R. Co. v. Baldwin, 117 Fed. (2d) 510 (Eighth Circuit, 1941);
Missouri Pac. R. Co. v. Fikes, 200 S. W. (2d) 97 (1947).

Whether or not the violation of the so-called Arkansas Lookout Statute (Section 11144, Pope's Digest of the Statutes of Arkansas, 1937), if any, was the proximate cause of injuries to plaintiff's decedents is a question of fact for the jury.

- Russell v. St. Louis-S. W. Ry. Co.**, 113 Ark. 353, 168 S. W. 135 (1914);
Blytheville L. & A. S. Ry. Co. v. Gessell, 158 Ark. 569, 250 S. W. 881 (1923);
Missouri Pac. R. Co. v. Ross, 194 Ark. 877, 109 S. W. (2d) 1246 (1937);
Missouri Pac. R. Co. v. Severe, 202 Ark. 277, 150 S. W. (2d) 42 (1941);
Missouri Pac. R. Co. v. Farman, 208 Ark. 133, 185 S. W. (2d) 91 (1945).

Where there is evidence from which the jury could find for the defendant, a motion for a directed verdict in favor of plaintiff is properly refused.

- Lancaster v. Collins**, 115 U. S. 222, 29 L. Ed. 373 (1885);
United States v. Brown, 107 Fed. (2d) 401 (Fourth Circuit, 1939);
Pearl Assurance Co. v. Stacey Bros. Gas Construction Co., 114 Fed. (2d) 702 (Sixth Circuit, 1940).

By its general verdict in favor of defendant, the jury has found that defendant's negligence, if any, was not the

proximate cause of injury to plaintiff's decedents, and as there is substantial evidence to support this finding, it is conclusive.

**That Two Jury Verdicts Are Inconsistent With Each Other
Upon Similar Facts Is Not a Ground for Reversal.**

Where the Trial Court has approved a jury verdict, it will not be set aside upon appeal where there is evidence to support it merely because the appeal court feels that a different result should have been reached.

Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29, 88 L. Ed. 520 (1944);

Robinson v. Van Hooser, 196 Fed. 620 (Sixth Circuit, 1912);

Cleveland & Western Coal Company v. Main Island Creek Coal Co., 297 Fed. 60 (Sixth Circuit, 1924).

The holding of the Court of Appeals for the Sixth Circuit in the previous case arising from this accident is simply that a jury question is involved.

Boswell v. Thompson, 166 Fed. (2d) 106 (Sixth Circuit, 1948).

Upon facts such as those presented in the instant case, whether the proximate cause of the accident was defendant's failure to stop its train or the failure of the driver of the automobile to stop it before driving upon the track, is clearly a question of fact for the jury, upon which it could find either way.

Klutt v. Philadelphia & R. Ry. Co., 145 Fed. 965 (Circuit Court, E. D. Penn., 1906).

That another jury upon similar facts reached a different conclusion is not a ground for reversal.

In the case of **Lowe v. Hagerty**, 283 Pa. 459, 129 Atl. 457, suit was brought by the operator of a motorcycle for injuries received in an accident with defendant. Previously suit had been brought by a passenger upon the same motorcycle and injured in the same accident, and a jury verdict returned for defendant, which was approved. In the instant case there was a verdict for plaintiff, and defendant moved for a new trial on the ground that this verdict was against the weight and preponderance of the evidence. This motion was overruled, and plaintiff appealed. On appeal, the Supreme Court of Pennsylvania said:

“Defendant has appealed, and asks us to hold that the trial court abused its discretion in refusing to consider the record of the prior case in comparison with the present record, and, on such consideration, to grant a new trial. He reasons that, if opposite answers are given on the same evidence, in the same court, it is not possible both verdicts can be right; in effect, he would have us assume that the first verdict is correct, and therefore the jury, in the second case, must have acted capriciously in disregard of the evidence and the rights of the parties. With this position we cannot agree. Conceivably, the second verdict may be the sound one on the truth of the evidence, or, for all we know, the verdict for defendant in the first case may have been required by a release from the then plaintiff; or the evidence in the two cases may not have been the same. As the record of the prior case is not before us, we are unable to analyze the considerations which induced the verdict in that instance. In short, we must abide by the present record as containing the only evidence for examination, and we find no abuse of discretion there by the court below in refusing to grant a new trial, which is the sole question raised by the assignment of error.”
(129 Atl. at p. 458.)

This rule was reaffirmed in **Hegarty v. Berger**, 304 Pa. 221, 155 Atl. 484, on similar facts, where the Court said:

“That the jury here may have found the facts differently from those found by the jury in the case of **Robinson v. Berger**, *supra*, growing out of the same accident, does not necessitate a new trial.” (155 Atl. at p. 486).

It was adopted by the Federal Courts in **American Cooler Co., Inc., v. Fay & Scott**, 20 Fed. Supp. 782 (1937), where the District Court said:

“The verdict was arrived at after a careful trial, with able counsel participating with no apparent errors and with instructions to the jury which were not excepted to. There is no reason to think that the jury failed to exercise a deliberate and unbiased judgment or that it was influenced by any prejudice, unless such can be inferred from the verdict alone. There was a direct and irreconcilable conflict of testimony, The jury, after apparently adequate instructions, including the rule as to burden of proof, adopted the view of the facts as testified to by the witnesses for the defendant. **The court or another jury might take another view of the matter, but under our procedure that is not the question.** It is not sufficient ground for a new trial that a verdict is merely against the preponderance of the testimony. It must be so manifestly and palpably against the evidence in the case as to compel the conclusion that the verdict is contrary to right and justice.” (Emphasis supplied.) (20 Fed. Supp., at p. 783).

The instant case must be considered upon its own facts alone, and the jury having returned a general verdict for defendant, supported by substantial evidence and approved by the Trial Court, and there being no error of law in the trial of the case, it was properly affirmed by the Court of Appeals for the Sixth Circuit.

CONCLUSION.

A correct result having been reached by the Court of Appeals for the Sixth Circuit and the questions presented not being of general importance, it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Received a copy of the foregoing Brief of Respondent in
Opposition to Petition for Certiorari, on this day of
....., 1949.

.....
Attorneys for Petitioner.